UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

North Baja Pipeline, LLC — Docket No. RP05-25-000

ORDER ACCEPTING AND SUSPENDING TARIFF SHEETS
SUBJECT TO CONDITIONS

(Issued November 12, 2004)

1. On October 14, 2004, North Baja Pipeline, LLC (North Baja) filed tariff sheets reflecting a negotiated rate transaction with MGI Supply Ltd. (MGI) that deviates from the form of service agreement found in North Baja's FERC gas tariff.[1] Additionally North Baja is proposing to modify its General Terms and Conditions (GT&C) to add reservation charge credit provisions and to add a new paragraph within its GT&C that establishes terms and conditions relating to the rationalization of capacity in anticipation of an expansion of the North Baja pipeline designated to provide markets in the western United States with direct access to Liquefied Natural Gas-sourced supplies in Mexico.[2] For reasons discussed more fully in the body of this order, the Commission accepts and suspends North Baja's tariff sheets, subject to refund, effective November 15, 2004, and subject to conditions. This order benefits the public by ensuring compliance with the Commission's policies on negotiated rate service agreements.

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[1] Amended Form of Service Agreement Applicable to Firm Transportation Service Offered By North Baja Pipeline, LLC under Rate Schedule FTS-1. The North Baja Pipeline extends from an interconnection point with El Paso Natural Gas Company near Ehrenberg, Arizona to a point on the international border between Yuma, Arizona and Mexicali, Baja California, Mexico.

[2] Third Revised Sheet No. 6, Original Sheet No. 9, Second Revised Sheet No. 116, Original Sheet No. 116.a, Original Sheet No. 203, Original Sheet No. 204, and Sheet Nos. 205-229 to FERC Gas Tariff, Original Volume No. 1.

I. Details of the Filing

2. North Baja submitted a non-conforming service agreement with MGI, an agency of the Mexican government, pursuant to section 154.112(b) of the Commission's regulations which requires that service agreements that deviate in any material aspect from the form of service agreement in a pipeline's tariff be filed with the Commission.

3. Specifically, North Baja proposes to extend the payment period from 10 days to 15 days from receipt of an original invoice to make payment. North Baja indicated that it must comply with the accounting obligations placed upon it by an agency of the Mexican government. Further, North Baja proposes language modifying the venue for arbitration from San Diego, California to New York, New York. North Baja asserts that MGI has legal support available in New York, if necessary.

4. North Baja also proposes several revisions to its tariff establishing terms and conditions relating to the rationalization of capacity in anticipation of an expansion of the North Baja pipeline designed to provide western U.S. markets with direct access to LNG-sourced supplies in Mexico.

5. Specifically, North Baja proposes to add reservation charge credit language providing that if, due to a force majeure event, North Baja cannot provide any portion of a firm shipper's service for a period greater than ten consecutive days, then affected firm shippers will be entitled to a reservation charge credit. The amount credited will be equal to that portion of a shipper's Maximum Daily Quantity (MDQ) that North Baja is unable to deliver multiplied by the return on equity and related income tax component of North Baja's firm reservation charges.

6. Lastly, in anticipation of a planned expansion of its system in conjunction with Gasoducto Bajanorte and Transportadora de Gas Natural, North Baja proposes tariff language which will allow shippers to reverse the direction of their receipts and deliveries in connection with a one-time capacity release to (1) reverse their contract path from the present north-to-south direction to a south-to-north direction, and (2) assign their service agreement to a third party without going through North Baja's existing capacity release procedures. North Baja argues that flow reversal rights are essential to rationalizing capacity because parties interested in bringing LNG supplies from Baja California to the U.S. will require firm capacity rights from Mexico to the United States.

II. Notice, Interventions, and Protests

7. Public notice of the filing was issued on October 19, 2004. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2004)). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2004), all timely motions to intervene and any motions to intervene out-of-time filed before the issuance

date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. One party filed a motion of support and one party filed a protest.

8. MGI filed a motion of support stating that North Baja's proposal preserves the economic bargain struck at the outset of the North Baja project and helps insulate Mexican consumers from stranded cost risks.

9. Termoelectrica de Maxicali S.de R.L. de C.V. (TDM) filed comments supporting North Baja's proposal to allow shippers to reverse the direction of their receipts and deliveries in connection with a one-time capacity release. TDM, however, protested North Baja's reservation charge credit proposal, stating that North Baja should provide for full reservation charge credits when the underlying failure to deliver was reasonably within North Baja's control.

III. <u>Discussion</u>

10. For the reasons discussed below, the Commission accepts and suspends North Baja's proposal, effective November 15, 2004, subject to conditions.

11. The Commission agrees with the TDM argument that North Baja must provide a full reservation charge credit whenever there is a service interruption in a non-force majeure event. Therefore, the Commission directs North Baja to modify its proposal to provide for full reservation charge credits whenever there is a service interruption in a non-force majeure event. Such action is consistent with Commission policy set forth in *Natural Gas Pipeline Company of America*.[3]

12. Regarding service interruptions during a force majeure event, the Commission is concerned, however, that there is certain language in the proposed section 7.6, Reservation Charge Credits, that does not fully comply with Commission policy.

13. North Baja states in its proposal that if, due to a force majeure event, North Baja is unable to provide any portion of a firm shipper's service for a period greater than ten consecutive days, then affected firm shippers will be entitled to a partial reservation charge credit. North Baja states that the amount credited will be equal to that portion of a shipper's MDQ that North Baja is unable to deliver multiplied by the return on equity and related income tax component of North Baja's firm reservation charges.

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[3] *Natural Gas Pipeline Company of America*, 106 FERC ¶ 61,310, *order on reh'g and granting clarif.*, 108 FERC ¶ 61,170 (2004).

14. The Commission has provided guidance regarding reservation credits in several cases. In *El Paso Natural Gas Company (El Paso)*,[4] the Commission required the pipeline to provide for partial reservation charge credits equal to the return on equity and income tax portion of the reservation charge for service interruptions from day one caused by force majeure situations. The Commission held that force majeure events are no-fault occurrences, and therefore, all parties including the pipeline, should share the burdens of a force majeure interruption. The Commission further explained its reservation charge credit policy in *Texas Eastern Transmission Corporation*.[5] In *Texas Eastern*, the Commission stated that the pipeline must issue demand charge credits if it fails to deliver under most circumstances, except in limited circumstances such as a force majeure occurrence. The Commission stated Texas Eastern should not receive relief after the lesser of ten days or when it has or should have, in the exercise of due diligence, overcome the force majeure event. Finally, in *Natural Gas Pipeline Company of America*,[6] the Commission held that shippers are entitled to the full reservation charge credits once the ten-day period ends and reservation charge credits would not apply to a shortfall that occurs within ten days. In sum, the Commission has two concurrent policies which allow either full reservation credits after ten days or partial crediting starting at day one of a force majeure event. In the instant filing, North Baja is seeking a hybrid of the two policies. North Baja's proposal only provides partial reservation charge credits for a period greater than ten days and is inconsistent with current Commission policy.

15. The Commission finds that North Baja has not fully supported its reservation credit proposal. Therefore, the Commission directs North Baja: (1) either to modify its proposal to conform to Commission precedent regarding full and partial credits; or (2) provide further justification and support of its reservation charge credit proposal in order to satisfy the sharing of risk requirements pronounced in Opinion No. 406.[7]

16. North Baja further proposes tariff language regarding reverse flow and a one-time capacity assignment right. In its proposal, North Baja describes the process by which all original shippers may (1) reverse the primary direction of flow under their contracts, and

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[4] *El Paso Natural Gas Company*, 104 FERC ¶ 61,045 (2003); *clarif. order*, 108 FERC ¶ 61,056 (2004).

[5] *Texas Eastern Transmission Corporation*, 62 FERC ¶ 61,015 (1993) (*Texas Eastern*).

[6] *Natural Gas Pipeline Company of America*, 106 FERC ¶ 61,310 (2004).

[7] *Tennessee Gas Pipeline Co.*, 76 FERC ¶ 61,022 (1996) (Opinion No. 406), *order on reh'g*, 80 FERC ¶ 61,070 (1997) (Opinion No. 406-A).

(2) permanently assign all or a portion of their negotiated rate agreements to creditworthy third parties, including new LNG suppliers. North Baja asserts that its flow reversal and assignment proposal will "allow for capacity rationalization and facilitate infrastructure development . . . ."[8] It also asserts that its proposal is consistent with the Commission's authorization in *Gulfstream*.[9] Finally, North Baja states that its proposal will allow shippers who seek to permanently release their capacity to avoid ongoing contractual liability (North Baja notes that if it is not guaranteed the full benefit of its negotiated rate agreements, it will not agree to permanent releases of capacity to third parties).[10]

17. The Commission's capacity assignment policies are reflected in section 284.8 of the regulations. These regulations require that long-term capacity releases and rollovers of short-term, less-than-maximum tariff rate transactions be posted for competitive bidding. The regulations require the pipeline allocate the released capacity to the person offering the highest rate (not over the maximum rate) and meets any terms and conditions of the release. This policy insures that released capacity is allocated to those who value it most.

18. All of North Baja's long-term services are provided under negotiated rate agreements that provide for fixed rates for the life of the contract. North Baja states that it entered into these negotiated rate agreements with its shippers with the understanding that it would under-recover its costs in the early years of the contracts since the negotiated rates associated with each contract are lower than North Baja's initial maximum recourse rate for firm service, but recoup these under-recoveries during the latter years of the contracts assuming that the negotiated rates might some day exceed the applicable recourse rate for firm service. Thus, these fixed-rate levels are below North Baja's current maximum rate for firm transportation service, but guarantee it a revenue stream for the term of the contract. North Baja's capacity assignment proposal effectively provides for a de facto waiver, or generally applicable deviation from the notice and posting requirements of the Commission's regulations.

19. North Baja justifies this de facto waiver as "essential to preserving the commercial value of the contracts" (*i.e.,* it fixes the price North Baja receives even if the recourse rate is reduced to a level below that price). North Baja also argues that allowing assignment

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[8] North Baja's filing at 6.

[9] *Gulfstream Natural Gas System, L.L.C. (Gulfstream),* 107 FERC ¶ 61,303 (2004); 108 FERC ¶ 61,294 (2004). In this proceeding, the Commission approved a negotiated rate agreement which included a provision permitting the rate to be assigned to a third party if the third party obtained the capacity associated with the agreement through the ordinary provisions of Gulfstream's tariff.

[10] *See* North Baja's filing at 6 n.7.

of the negotiated rate contracts and capacity rights, for less than the current maximum rate, without competitive bidding procedures, "avoids exposing original shippers [MGI] to ongoing contractual liability." In other words, MGI would no longer be obligated to North Baja, if, for example, the new shipper were to default. Thus, absent this de facto advance waiver, North Baja would require releasing shippers (like MGI) to honor their contractual obligations under long-term negotiated rate agreements for the duration of those agreements, if released capacity were to be awarded through the competitive capacity release bidding procedures to recourse rate shippers who might in the future be paying a rate lower than the rate originally negotiated with MGI.

20. The Commission finds that North Baja has not adequately supported its proposal to permanently assign negotiated rate agreements without undergoing a competitive bidding process. If the shipper to whom the capacity is to be assigned were willing to agree to pay the maximum recourse rate, then the permanent release could take place without posting for competitive bids, regardless of the fact that the current shipper is paying a negotiated rate less than the maximum rate. But if the new shipper would pay less than the maximum recourse rate, then Commission policy is clear that the capacity must be posted. Therefore, North Baja's tariff proposal is rejected to the extent it would broadly permit the assignment to take place at less than the maximum rate without posting for competitive bids. The Commission is reluctant to grant a blanket waiver of its competitive bidding requirements for all future circumstances. Since there is no specific proposal to assign capacity outside the capacity release procedures before us, North Baja's request for a de facto waiver is premature. This rejection is without prejudice to the pipeline filing and seeking a case-specific waiver of the Commission's competitive bidding procedures for a particular assignment, provided that it demonstrates that such waiver is in the public interest. Arguments related to the benefits of receipt of LNG supplies from Mexico, capacity rationalization, and infrastructure development, can be considered at that time. Therefore, the Commission directs North Baja to revise its tariff to conform to Commission precedent regarding competitive bidding procedures.

21. Finally, the Commission finds the two non-standard terms, timing of payment and change in arbitration venue, added to MGI's Firm Transportation Service Agreement under this proposal reasonable and consistent with previous Commission orders. Therefore, the Commission accepts these changes.

IV. Suspension

22. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that

it may be inconsistent with other statutory standards.[11] It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results.[12] Such circumstances exist here, where North Baja seeks to facilitate access to international energy sources. Accordingly, the Commission will exercise its discretion to suspend the tariff sheets listed below for a nominal period and permit the tariff sheets to become effective November 15, 2004, subject to refund and conditions.

The Commission orders:

(A) North Baja's proposed tariff sheets reflecting a negotiated rate transaction with MGI (Amended Form of Service Agreement Applicable to Firm Transportation Service Under Rate Schedule FTS-1) and modifying its GT&C (Third Revised Sheet No. 6, Original Sheet No. 9, Second Revised Sheet No. 116, Original Sheet No. 116.a, Original Sheet No. 203, Original Sheet No. 204, and Sheet Nos. 205-229 to FERC Gas Tariff, Original Volume No. 1) are accepted and suspended, subject to refund, and the conditions set forth herein, to be effective on November 15, 2004.

(B) North Baja is directed to file, within 30 days of the date this order issues, the supplemental information or revisions discussed in the body of this order.

By the Commission.

Linda Mitry,
Deputy Secretary.

[11] *See Great Lakes Gas Transmission Company*, 12 FERC ¶ 61,293 (1980) (five-month suspension).

[12] *See Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension).